Filed 9/28/09 P. v. Rojas CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JESUS ROJAS, Defendant and Appellant.	H033186 (Santa Clara County Super. Ct. Nos. CC768574, CC771502)

Jesus Rojas appeals from a judgment of conviction of two counts of inflicting corporal injury upon a former cohabitant, Rhyana Canales, with a previous conviction under Penal Code section 243, subdivision (e)[1] (§ 273.5, subd. (e)(2)) (counts one and five), one count of vandalism (§ 594, subds. (a), (b)(1)) (count three), and two counts of violating a protective order (§ 273.6, subd. (a)) (counts four and six) following a jury trial. Defendant admitted a prior prison term enhancement allegation (§ 667.5, subd. (b)). Defendant was sentenced to a total prison term of five years and eight months.

[1] All statutory references are to the Penal Code unless otherwise specified. Subdivision (e) of section 243 includes any battery "committed against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiancé, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship . . . ."

Defendant Rojas challenges the sufficiency of the evidence to establish cohabitation, attacks the trial court's failure to inform the jury that the alleged victim had recanted her preliminary hearing testimony and refused to testify at trial, claims ineffective assistance of counsel, and asserts the trial court erred by not specifying the term of defendant's drivers license suspension. We conclude that the trial court must exercise its statutory discretion to determine the appropriate period of suspension and remand for that limited purpose.

A. *Procedural History and Evidence*

The first information was filed on September 10, 2007. An amended information was filed on October 23, 2007. On October 24, 2007, witness Canales was present in court and she was ordered to return to court on Friday October 26, 2007. Witness Canales failed to appear on October 26, 2007. The court ordered a body attachment for Canales. Canales appeared in court on October 29, 2007 and the trial court recalled the body attachment. The People called Canales to testify but she was crying on the witness stand and did not answer questions. Canales was ordered to return to court on October 30, 2007 and the case was continued. On October, 30, 2007, Canales failed to appear and the trial court granted the defense motion for a mistrial.

On October 31, 2007, Canales was present in court and the trial court ordered her to return on November 5, 2007. On November 5, 2007, the trial court ordered a body attachment for Canales who was not present. Canales appeared in court on January 9, 2008 and the trial court ordered her to return on January 14, 2008 but she again failed to appear and the trial court again ordered a body attachment.

On January 30, the court, in ruling on the People's motions in limine, determined that Canales was legally unavailable for trial pursuant to Evidence Code section 240 and her preliminary hearing testimony would be admissible at trial. At trial, Canales's

preliminary hearing testimony, which had been given on August 16, 2007, was read to the jury.

The evidence at trial showed the following. Defendant was Canales's boyfriend. They began dating about two years before her testimony and they had a "serious dating relationship." Canales had lived with defendant for about a month during December 2006. Canales son, who was nine years old at the time of trial, recalled that defendant spent some nights at their house and his mom, his sister, and he spent nights at defendant's house.

In February 2007, defendant broke Canales's arm, which required surgery. On February 15, 2007, a three-year protective order prohibiting defendant from contacting Canales was issued against defendant (see § 136.2) and defendant pleaded nolo contendere to battery (§§ 242, 243, subd. (e)).

Sometime during the week of Canales's birthday on May 31, 2008, while she was staying at defendant's home in Tracy, defendant started calling Canales names in front of her children. She tried to stop him because she thought it was inappropriate. Defendant pulled Canales off to the side so her children would not see what he was doing and he kicked Canales in the shins with his steel-toed boots. He may have also grabbed her by the arm during that incident. She felt "quite sore" and bruised. When asked whether she did anything to stop defendant from striking her, Canales stated: "In the beginning, yes. But I kind of just became more or less in shock or numb after he repeatedly kept kicking me."

On June 1, 2007, San Jose Police Officer Adam Carawley conducted a welfare check of Canales at her home after receiving a call from Canales's father who was concerned about her wellbeing. Defendant, who apparently was present, was detained in the back of a police car and then arrested on a warrant for a traffic violation. Canales appeared nervous and scared and, at one point, she was crying. Officer Carawley noticed

Canales had some injuries consisting of bruising on her legs and an arm. Another officer took photographs, which were admitted into evidence. At trial, Canales and Officer Carawley agreed that that the photographs reflected her physical condition at the time they were taken. One of the photographs showed a "purple bruise on her shin." Another photograph showed three bruises to her left arm, injuries caused by defendant.

Defendant went to Canales's home on the evening of June 20, 2007 and went in through the open garage and he stayed the night with her. On the morning of June 21, 2007, Canales and defendant were having a discussion in the kitchen about defendant moving into Canales's home. Canales told him she did not think it was a good idea because of the "previous incidences" and his anger issues. Defendant reacted angrily and punched her in the face and eardrum with a closed fist more than three or four times. Canales was thrown off balance. Defendant stopped hitting her, seemed to realize what he was doing, and voiced out loud that "he wasn't supposed to be doing that." He tried to make certain that everything was okay and that she was not going to call the police. Defendant left Canales's home 20 to 25 minutes later.

Canales then gathered her children, put them in her car, and drove to a friend's house. She did not stay in her own home that night.

When she returned home on June 22, 2007, she saw a car parked in front of her house, which she did not recognize, and there were one or two persons inside it. She drove into the garage, took her children out of the car, and, as she started to head toward the garage door into the house, the "door flung open" and defendant came out and shouted her name. Canales turned around, ran down the driveway, and "ran up to a neighbor's front door and started pounding on it." Defendant asked Canales's son where his laptop was. Defendant popped the trunk, grabbed his laptop, and ran up the hill. Canales saw defendant running off, carrying his laptop computer.

When the neighbor did not answer the door, Canales ran back, jumped in her car, called 9-1-1 on her cell phone, and drove away with the children. The audio and a transcript of the 9-1-1 call were admitted into evidence. A dispatcher stayed on the phone with Canales until officers reached her.

One of the responding officers, Officer Cassondra Sanchez, recalled that Canales appeared very scared and was crying on and off while they were speaking. Canales was holding the left side of her head, her ear, and her neck and complaining of pain and trouble hearing.

The officers went to Canales's residence and checked to make sure nobody was inside before Canales returned. The interior garage door had been damaged, the television had been "totally smashed in," remote controls had been broken, clothing had been cut or shredded, and gold hoop earrings, social security cards, birth certificates, and 500 to 600 dollars in cash had been taken.

Canales had trouble hearing for quite a few weeks after the June 21, 2007 incident. She experienced pain in her left eardrum area and went to the emergency room at some point.

B. *Evidence of Cohabitation*

Section 273.5, subdivision (e), includes infliction of corporal injury upon a "former cohabitant." Count one charged a violation of that section on or about June 21, 2007 and count five charged a violation of that section on or about and between May 28, 2007 and June 1, 2007. The prosecution's theory at trial was that defendant and Ms. Canales had cohabitated during December 2006.

The term "cohabitants" as used in section 273.5 means two unrelated persons "living together in a substantial relationship — one manifested, minimally, by permanence and sexual or amorous intimacy." (*People v. Holifield* (1988) 205 Cal.App.3d 993, 1000; see *People v. Taylor* (2004) 118 Cal.App.4th 11, 18; *People v.*

Moore (1996) 44 Cal.App.4th 1323, 1333; CALCRIM No. 840, pp. 600-601.) "The element of 'permanence' in the definition refers only to the underlying 'substantial relationship,' not to the actual living arrangement." (*People v. Moore, supra,* 44 Cal.App.4th at p. 1334 [concept of "permanence" does not require exclusivity]; see *id.* at p. 1335 ["for purposes of criminal liability under section 273.5, a defendant may cohabit simultaneously with two or more people at different locations, during the same time frame, if he maintains substantial ongoing relationships with each and lives with each for significant periods"].)

"[S]ection 273.5 requires something more than a platonic, rooming-house arrangement." (*People v. Holifield, supra,* 205 Cal.App.3d at p. 999.) But it does not require a person hold himself or herself out as "the husband or wife of the person with whom one is cohabiting." (§ 273.5, subd. (b).) Proof of a sexual relationship is not required. (See *People v. Ballard* (1988) 203 Cal.App.3d 311, 319.) The non-exclusive factors for determining whether people are cohabitating include (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties hold themselves out as husband and wife, (5) the continuity of the relationship, and (6) the length of the relationship. (See *People v. Holifield, supra,* 205 Cal.App.3d at p. 1001; see also CALCRIM No. 840, pp. 600-601.) "The cases addressing the cohabitation element of section 273.5 'have interpreted it broadly, refusing to impose any requirement of a "quasi-marital relationship." ' (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1333 . . . .)" (*People v. Belton* (2008) 168 Cal.App.4th 432, 437-438.)

The jury could reasonably infer from Canales's testimony that she was more than a visitor in defendant's house during December 2006, Canales and defendant had a serious, lengthy romantic relationship, and they had resided as a couple in the same household

during that month. Moreover, the jury could reasonably conclude that period was substantial given the nature of their relationship.

Generally, "the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." (Evid. Code, § 411.) "On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence-that is, evidence that is reasonable, credible and of solid value-from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 . . . ; *People v. Johnson* (1980) 26 Cal.3d 557, 578 . . . .) ' "[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." ' (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 . . . .)" (*People v. Snow* (2003) 30 Cal.4th 43, 66.) "Even when there is a significant amount of countervailing evidence, the testimony of a single witness that satisfies the [substantial evidence] standard is sufficient to uphold the finding." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) The evidence is sufficient to establish that Canales was a "former cohabitant" within the meaning of section 273.5. (Cf. *People v. Belton*, *supra*, 168 Cal.App.4th 432, 435-436, 438 [victim lived with defendant in various locations, including the victim's rented room, motels, other people's homes, and a car, for some unspecified portion of their two-month relationship that ended prior to the offenses]; *People v. Taylor*, *supra*, 118 Cal.App.4th 11, 17, 19 [defendant and victim had dated for about five months and, during that time, victim had lived in defendant's car "for periods of time when she was homeless and had no other place to stay" and they spent the night before the charged crimes in defendant's car]; *People v. Holifield*, *supra*, 205 Cal.App.3d 993, 995-996, 1002 [defendant lived with victim in her rented motel room "half or more of the three months preceding the assault"].)

C. *No Error in Not Instructing Regarding Alleged Victim's Refusal to Testify at Trial*

On February 4, 2008, during the course of trial, defense counsel indicated to the court that Canales was present and she now wanted to testify contrary to her testimony at the preliminary examination. The trial court announced it was appointing counsel to represent her. Subsequently that day, a hearing was held outside the jury's presence. The defense called Canales as a witness. Defense counsel asked her whether her testimony that day was going to be the same or different from her preliminary hearing testimony. Canales refused to answer that question under the Fifth Amendment. Defense counsel then inquired, "If I were to ask you questions regarding those events that occurred in May and June of last year, . . . would it be the case that for all of those questions you would be invoking your privilege against self incrimination?" Canales answered, "Yes." Her appointed counsel indicated that his client would claim the Fifth Amendment privilege as to statements she had made to law enforcement officers, statements she had made at the preliminary hearing, and statements she had made to the judge or law enforcement officers regarding her address. Defense counsel and the prosecutor agreed to excuse Canales and she was excused.

Defendant asserts that due process required the court to instruct the jury that Canales had "recanted her testimony as perjury" and refused to testify by invoking the Fifth Amendment for fear of a perjury prosecution. The People maintain that it was "never established that Canales was refusing to testify because she feared a perjury prosecution."

"The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request. (*People v. Breverman* (1998) 19 Cal.4th 142, 154 . . . [sua sponte duty]; *People v. Wickersham* (1982) 32 Cal.3d 307, 323 . . . [sua sponte duty], overruled on other

grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201 . . . ; *People v. Flannel* (1979) 25 Cal.3d 668, 684 . . . [duty upon request].)" (*People v. Blair* (2005) 36 Cal.4th 686, 744-745.) "A trial court must instruct sua sponte 'only on those general principles of law that are closely and openly connected with the facts before the court and *necessary for the jury's understanding of the case.* [Citation.]' (*People v. Price* (1991) 1 Cal.4th 324, 442 . . . , italics added.)" (*People v. Zamudio* (2008) 43 Cal.4th 327, 370.) "It is well settled that a defendant has a right to have the trial court, on its own initiative, give a jury instruction on any affirmative defense for which the record contains substantial evidence (*People v. Michaels* (2002) 28 Cal.4th 486, 529 . . .) -- evidence sufficient for a reasonable jury to find in favor of the defendant (*Mathews v. United States* (1988) 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54) -- unless the defense is inconsistent with the defendant's theory of the case (*People v. Breverman* (1998) 19 Cal.4th 142, 157 . . .)." (*People v. Salas* (2006) 37 Cal.4th 967, 982; cf. *People v. Breverman* (1998) 19 Cal.4th 142, 162 [trial court is not obliged to instruct on a defense theory regarding a lesser included offense that has no evidentiary support].)

In this case, the defense presented no evidence, such as a declaration against interest (Evid. Code, § 1230, see Evid. Code, § 240, subd. (a)(1) [unavailability of witness based on privilege]), to the triers of fact from which it could be inferred that Canales had lied at the preliminary hearing. Based upon the evidence before the jury, the trial court had no duty to instruct regarding the evidentiary effect of a witness invoking the Fifth Amendment privilege against self-incrimination. The court had no duty to inform the jury that Canales, out of its presence, had invoked her Fifth Amendment privilege against self-incrimination or to instruct the jury that it had a right to draw inferences from that claim of privilege because no permissible inference may be drawn.

"A defendant's rights to due process and to present a defense do not include a right to present to the jury a speculative, factually unfounded inference [based upon invocation

of the Fifth Amendment privilege against self-incrimination]. (See *People v. Frierson, supra,* 53 Cal.3d at p. 743.)" (*People v. Mincey* (1992) 2 Cal.4th 408, 442; see *People v. Holloway* (2004) 33 Cal.4th 96, 129-132 [reaffirming *Mincey*].) "No inference may properly be drawn from the invocation of a privilege. (Evid. Code, § 913, subd. (a).) Allowing a witness to be put on the stand to have the witness exercise the privilege before the jury would only invite the jury to make an improper inference. [Citations.] Therefore, 'it is the better practice for the court to require the exercise of the privilege out of the presence of the jury.' [Citation.] [The California Supreme Court has] 'commend[ed]' the approach 'as a means by which to avoid the potentially prejudicial impact of the witness asserting the privilege before the jury.' (*People v. Ford* (1988) 45 Cal.3d 431, 441, fn. 6 . . . .)" (*People v. Frierson* (1991) 53 Cal.3d 730, 743.)

In this case, the trial court followed the recommended approach of having Canales exercise the privilege outside of the jury's presence. It was never determined that Canales's prior testimony was perjurious.[2] Moreover, if Canales had invoked the Fifth Amendment privilege in front of the jury, the prosecutor would have been entitled to an instruction forbidding the jury from drawing any inference.[3]

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[2] "Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury." (§ 118, subd. (a).) The fact that a victim of domestic violence disavows prior testimony does not mean that testimony was necessarily perjurious. The tendency of domestic violence victims to later recant is well known. (See *People v. Brown* (2004) 33 Cal.4th 892, 899.)

[3] Evidence Code section 913, subdivision (b), provides: "The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no

People v. Garner (1989) 207 Cal.App.3d 935, a case cited by defendant, does not persuade us that the instruction now suggested by defendant was required or appropriate in this case. In *Garner*, "[t]he prosecution's entire case-in-chief consisted solely of (1) an autopsy report indicating that [the victim] had died 'as a consequence of multiple gunshot wounds,' and (2) a reading into the record of the testimony given by the one and only witness produced at appellant's preliminary examination . . . ." (*Id*. at p. 937.) During the trial, the witness "swore during an in camera hearing whose nature was carefully concealed from the triers of fact, that his identification of appellant as the killer had been a lie." (*Id*. at p. 940.) It was stipulated in open court that the witness "told the deputy district attorney in charge of th[e] prosecution, 'that at the preliminary hearing he did make a positive identification of the defendant, but that he was lying when he did so. He said that it might be the defendant, but he could not be sure because he did not see the shooter's face. [¶] Further, in the same conversation when [the deputy district attorney] continued to question Mr. Phillips, he asked Mr. Phillips "Why he had ID'd the defendant at the preliminary hearing," [and] he said, "It was because of the Front Street Crips were in the courtroom," and he wanted to "fuck with them." He was also . . . "pissed off at [the defendant]." [¶] Further, he advised [the deputy district attorney] that he does not like [the defendant], but doesn't want him convicted on his perjured testimony.' " (*Id*. at p. 938, fn. 1.) Nevertheless, the trial court allowed the witness to refuse to testify in front of the jury and then admonished the jury that no inference could be drawn from a witness's refusal to testify based upon the constitutional privilege against self-incrimination. (*Id*. at pp. 938-939.)

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presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding."

The appellate court in *Garner* found that the trial court had erred in informing the jury that no inference could be drawn from the witness's refusal to testify under the circumstances. (*Id*. at pp. 938-941.) It further concluded that "where the witness's earlier avowedly false testimony provides a basis for determining the accused's guilt, the jury ought properly to be instructed that it should, rather than it should not, draw all appropriate inferences regarding the defendant's actual guilt or innocence from the witness's refusal to speak." (*Id*. at p. 939.) The appellate court stated: "When the People wish to go forward in reliance upon the testimony of a recanting witness, fundamental fairness would require, at a minimum, that the jury (1) be advised precisely why the witness is being allowed to refuse to testify, i.e., an alleged fear of a perjury prosecution, and (2) be instructed that they should draw all reasonable and appropriate inferences therefrom concerning the witness's credibility and the guilt or innocence of the accused."[4] (*Id*. at p. 941.)

Garner failed to consider Evidence Code section 913, which was enacted in 1965 (Stats. 1965, ch. 299, § 2, operative Jan. 1, 1967). "Section 913 prohibits any comment on the exercise of a privilege and provides that the trier of fact may not draw any inference therefrom."[5] (Assem. Com. on Judiciary com., 29 B Pt. 3A West's Ann. Evid. Code (ed.) foll. § 913, p. 245.) Of course, "[s]ection 913 does not purport to deal with

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[4] The appellate court further suggested that "the truly preferable approach" "would have been for the trial court to condition the People's request to introduce Phillips's allegedly perjured testimony upon its granting him immunity from prosecution pursuant to Penal Code section 1324." (*Garner, supra*, 207 Cal.App.3d at p. 941.) Nothing in the record indicates that any party sought witness immunity for Canales.

[5] Evidence Code section 913, subdivision (a), provides: "If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding."

the inferences that may be drawn from, or the comment that may be made upon, the evidence in the case." (*Id*. at p. 246.) The Supreme Court has clearly held that "[t]he jury may not draw any inference from a witness's invocation of a privilege. (Evid.Code, § 913, subd. (a); *People v. Mincey* (1992) 2 Cal.4th 408, 441 . . . .)" (*People v. Doolin* (2009) 45 Cal.4th 390, 441-442.)

Even in the situation where the witness might be the actual perpetrator of the crime with which a defendant is charged, a defendant has no due process right to force the witness to invoke the Fifth Amendment privilege against self-incrimination before the jury because inferences from its exercise are too speculative. (See *People v. Holloway, supra,* 33 Cal.4th at p. 130; *People v. Mincey, supra,* 2 Cal.4th 408, 440-442.) The California Supreme Court has squarely rejected the argument that "Evidence Code section 913 infringes upon [a defendant's] constitutional rights to due process and to present a defense." (*People v. Mincey, supra,* 2 Cal.4th at p. 441.) These authorities bind our court. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Federal courts have likewise concluded that defendants have no right to force a witness to invoke his Fifth Amendment privilege before the jury because no legitimate inferences may be drawn from the decision of a witness to exercise his constitutional privilege. (See e.g. *U.S. v. Castorena-Jaime* (10th Cir. 2002) 285 F.3d 916, 931; *U.S. v. Harris* (7th Cir. 1976) 542 F.2d 1283, 1298; *U.S. v. Lacouture* (5th Cir. 1974) 495 F.2d 1237, 1240; *U.S. v. Johnson* (1st Cir. 1973) 488 F.2d 1206, 1211; *Bowles v. United States* (D.C. Cir. 1970) 439 F.2d 536, 541; see also *Davis v. Straub* (6th Cir. 2005) 430 F.3d 281, 287 [trial court did not err by allowing witness to make a blanket invocation of Fifth Amendment privilege without taking the stand and responding to individual questions since "the [U.S.] Supreme Court has never held that permitting a witness to assert his or her Fifth Amendment privilege against self-incrimination without taking the witness stand violates a defendant's right to a fair trial].) A federal court has explained that "no

valid purpose can be served by informing the jury that a witness has chosen to exercise his constitutional privilege" since no proper inference may be drawn. (*Bowles v. United States*, *supra*, 439 F.2d at p. 542.)

We are not insensitive to defendant's due process right to a fair trial. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, *supra*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' *California v. Trombetta*, 467 U.S., at 485, 104 S.Ct., at 2532; cf. *Strickland v. Washington*, 466 U.S. 668, 684-685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984) ('The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment')." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [106 S.Ct. 2142] [erroneous exclusion of evidence regarding circumstances of confession]; see *Holmes v. South Carolina* (2006) 547 U.S. 319, 329 [126 S.Ct. 1727] [erroneous exclusion of evidence of third-party guilt].) In addition, under *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny, due process requires the government to disclose material evidence favorable to a defendant. (See *Strickler v. Greene* (1999) 527 U.S. 263, 280-281 [119 S.Ct. 1936].) But defendant is not asserting any erroneous exclusion of evidence[6] or any *Brady* violation in this appeal.

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[6] "Moreover, '[a]n appellate court may not reverse a judgment because of the erroneous exclusion of evidence unless the "substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by *any other means.*" ' (*People v. Livaditis* (1992) 2 Cal.4th 759, 778 . . . ; see Evid.Code, § 354, subd. (a).)" (*People v. Richardson* (2008) 43 Cal.4th 959, 1001.)

We reject defendant's contention that trial court had a duty to inform the jury that Canales "had recanted her testimony as perjury" or had invoked the Fifth Amendment privilege against self incrimination outside its presence or to instruct sua sponte that the jury was entitled to draw reasonable inferences from Canales's exercise of the privilege. Furthermore, we reject defendant's contention that his trial counsel rendered ineffective assistance by failing to request an instruction under *People v. Garner, supra,* 207 Cal.App.3d 935. Since no permissible inferences can be drawn from exercise of the Fifth Amendment privilege, defense counsel did not render ineffective assistance by failing to request an instruction under *People v. Garner, supra,* 207 Cal.App.3d 941. (See *Strickland v. Washington, supra,* 466 U.S. 668, 687-688, 691-692 [ineffective assistance claim must establish both deficient performance and prejudice and, as to performance prong, "the defendant must show that counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms"].)

D. *Driver's License Suspension*

Vehicle Code section 13202.6, subdivision (a)(1), provides in pertinent part: "For every conviction of a person for a violation of Section 594 . . . of the Penal Code, committed while the person was 13 years of age or older, the court shall suspend the person's driving privilege *for not more than two years*, except when the court finds that a personal or family hardship exists that requires the person to have a driver's license for his or her own, or a member of his or her family's, employment, school, or medically related purposes." (Italics added.) Before its amendment in 2006, this provision in Vehicle Code section 13202.6, subdivision (a)(1), provided for a "one year" suspension. (Stats. 2006, ch. 434, § 1, p. 2590; Stats. 1996, ch. 918, § 2, p. 5221.) In this case, the trial court suspended defendant's driver's license for "the term prescribed by law pursuant to 13202.6 of the California Vehicle Code."

A failure to exercise sentencing discretion may be an abuse of discretion. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 848.) We agree that this matter must be remanded to allow the trial court to exercise its statutory discretion.

The judgment is reversed for the limited purpose of allowing the trial court to exercise its discretion in setting the period of driver's license suspension pursuant to Vehicle Code section 13202.6.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.